March 22, 1973

OPINION LETTER NO. 101
Answer by letter-Mansur

FILED
101

Honorable Earl L. Schlef
Representative, District 60
Room 302, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Schlef:

This letter is in response to your request for an opinion from this office as follows:

> "1. May a fourth class city acquire ground for a city public park adjoining the city limits and within three miles of the city, as provided in Section 79.390 RSMO 1969, when the ground lies within the boundaries of another fourth class city?
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> "2. If a fourth class city may acquire such ground - either by purchase or donation - may it then enforce its own ordinances and rules and regulations within the park, or is it necessary for the city to contract with the adjoining city within whose boundaries the parkground is located?"

The first question submitted is whether a fourth class city may acquire ground for a city public park when the grounds lie within the boundaries of another fourth class city.

You refer to Section 79.390, RSMo 1969, which provides as follows:

> "The board of aldermen may establish, alter and change the channel of watercourses, and

> wall then and cover then over, and prevent obstructions thereon, and may establish, make and regulate public wells, cisterns and reservoirs of water, and provide for filling the same. The board of aldermen may purchase grounds and erect and establish market houses and marketplaces, and regulate and govern the same, and also contract with any person or persons, association or corporation, for the erection, maintenance and regulation of market houses, and marketplaces, on such terms and conditions and in such manner as the board of aldermen may prescribe. They may also provide for the erection, purchase or renting of the city hall, workhouse, houses of correction, prisons, engine houses, and any and all other necessary buildings for the city, and may sell, lease, abolish or otherwise dispose of the same, and may enclose, improve, regulate, purchase or sell all public parks or other public grounds belonging to the city, and may purchase and hold grounds for public parks within the city, or within three miles thereof."

Under this statute a fourth class city may purchase and hold grounds for public parks within the city, or within three miles thereof. Under the facts you submit, the location of the ground in question comes within this statute. The question now arises whether the city may purchase this ground due to the fact that it is within the boundaries of another fourth class city.

We have been unable to find any court decision in this state in which an issue similar to this has been decided.

Section 71.015, RSMo, which applies to all cities and towns in the state, prohibits any city to annex territory within the boundaries of another incorporated city. City of Olivette v. Graeler, 338 S.W.2d 827 (Mo. 1960).

In Wellston Fire Protection District of St. Louis County v. State Bank and Trust Company of Wellston, 282 S.W.2d 171 (St.L.Ct. App. 1955), the question before the court was whether the Wellston Fire Protection District, which included the cities of Wellston and other incorporated cities as well as unincorporated areas in St. Louis County or the city of Wellston, has the authority to regulate by ordinance the construction and building regulations within the city of Wellston. The statutes providing for the organization of fire protection districts expressly authorized such districts

to include all or any portion of an incorporated city. The statutes providing for the organization of fire protection districts gave the fire protection district power and authority to adopt and amend bylaws and regulations for fire protection and fire prevention ordinances and to exercise all rights and powers necessary or incidental to or implied from the specific powers granted. The statutes governing cities of the third class such as Wellston expressly authorized such cities to promulgate rules and regulations for fire prevention. In other words, the same power and authority was vested in the fire protection district as was vested in the city of Wellston in promulgating rules and regulations for fire preventions. The statutes providing for the formation of fire protection districts were enacted after the statutes granting cities of the third class authority to regulate the construction of buildings for fire protection.

The court stated the primary rule of statutory construction is to determine the intent of the legislature in enacting the statute. In discussing this question the court stated, l.c. 175-176:

> "This brings us to the crux of the case, viz.: In providing a statutory plan for the establishment of fire protection districts and in conferring upon such districts the right to exercise police power, was it the intention of the Legislature to withdraw identical power and authority previously granted by it from municipalities which become a part of a fire protection district? Or was it the intention to permit both the city and district to exercise police power for the purpose of accomplishing the same objective? We find the answer to the second query in McQuillen, Municipal Corporations, where it is said:
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> > 'It is firmly established that there cannot be at the same time, within the same territory, two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges. This rule does not rest on any theory of constitutional limitation, but instead on the practical consideration that intolerable confusion instead of good government almost inevitably would attain in a territory in which two municipal corporations of like kind and powers attempted to function coincidentally.'

(McQuillen, Municipal Corporations, 3rd Edition, Volume 2, Section 7.08, pages 269 and 270).

Quite obviously if the city and district possessed equal authority with respect to regulating and controlling the construction of buildings for the purpose of preventing fires and protecting persons and property therefrom, a situation could result leading to 'intolerable confusion'. If the regulations of each dealing with requirements coincided there would be no room for confusion. But, should the two, each prompted by a sincere desire to provide protection from the hazards of fire, see fit to prescribe different requirements, making compliance with both impossible, in what predicament would the prospective builder find himself? We cannot believe the Legislature intended that a construction should be placed upon its action as reflected by the adoption of the fire protection statute that would lead to such an unjust, absurd and unreasonable result. And it is our duty to prevent such from occurring. Laclede Gas Co. v. City of St. Louis, supra; Union Electric Co. v. Morris, supra."

Under Section 79.390, supra, a city of the fourth class is given express authority to enclose, improve or regulate all public parks or other public grounds belonging to the city. If one city is permitted to acquire land within the boundaries of another incorporated municipality, a conflict would arise as to which city would have jurisdiction over the property which would result in an intolerable confusion over the ordinances governing such property and police protection of such property. We do not believe that it was the intent of the legislature in enacting Section 79.390, supra, authorizing a city of the fourth class to purchase and hold grounds for public parks, that this would include grounds within another incorporated city. We do not believe it was intended by this statute to allow one city to purchase real estate in another city over which it would not have control as hereinafter discussed.

Your second question asks whether a fourth class city may enforce its own ordinances on property it owns which is located in another municipality. It is our opinion that the city within whose boundaries the park ground is located would have exclusive jurisdiction to enact ordinances with regard to police protection and all other general ordinances of the city in the same manner and to

the extent it has over other property within the city boundaries. Bredeck v. Board of Education of City of St. Louis, 213 S.W.2d 889 (St.L.Ct.App. 1948).

Section 79.010, RSMo, authorizes any city of the fourth class to incorporate and to receive and hold property, both real and personal, within such city and may purchase, receive and hold real estate within or without such city for the burial of the dead, and may purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire and may receive bequests, gifts and donations of all kinds of property.

It is our view that under this statute a city of the fourth class may accept property by bequest, gift or donation. This statute is silent as to whether property donated or bequeathed to a city must be within the corporate limits or whether such property can be beyond the corporate limits or within the corporate limits of another city.

There is a distinction to be made between the authority of a municipality to purchase property and its authority to receive property by gift, devise or donation.

In Kennedy v. City of Nevada, 222 Mo.App. 459 (K.C.Ct.App. 1926), the question before the court was whether the city of Nevada had authority to purchase property within its corporate limits for the purpose of operating a tourist camp solely for the accommodation of transients who were passing through the city. The city of Nevada was a third class city and governed by the statutes governing third class cities. However, such statutes that were construed in this case are similar to the statutes now governing cities of the fourth class. In discussing the question of the authority of a city to purchase property or its authority to receive property as a gift, the court stated, l.c. 465-466:

> "'The right of a municipality to acquire property is given by paragraph 33 of section 1692 of the Revised Statutes, in these words: "To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, . . . for the use of the corporation, and to sell or lease the same." Here is specific mention of the purposes for which land may be acquired. The controlling idea is that the property must be for the use of the corporation.'
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> "We do not say that the Legislature has no power to authorize cities of the third class

to acquire and hold property for other than strictly municipal purposes. It has been held that even under the common law land may be given or devised to the city or the city may obtain title by adverse possession, and the city may lawfully acquire title thereto although the land may not be wanted for municipal purposes, yet the city may acquire it for the reason that it may be applied by sale or lease to the alleviation of municipal burdens. [New Shoreham v. Ball, 14 R. I. 566.] And there is no doubt but that section 8206, Revised Statutes 1919, gives authority to cities of the third class to 'receive bequests, gifts and donations of all kinds of property.'

"'By the immemorial usage of the country it appears to have been recognized as an incident to the corporate powers of municipal corporations that they may purchase and hold property, both real and personal. So also a municipal corporation has an implied power to receive a gift of real estate for any corporate purpose. While a municipal corporation would of course have no power to purchase with the public funds land or other property except for such public purposes as it was authorized to expend money for by its charter, it is well settled that it may hold real estate which is not devoted or intended to be devoted to any public purpose when such property has come to it in a lawful manner, as by gift or devise or has ceased to be used for the public purpose for which it was originally acquired.' [19 R. C. L., pp. 770, 771.] (Italics ours.)

"A city can purchase property for municipal purposes and after it has become no longer necessary to be used for that purpose may hold it, and it may be that in holding all property that comes to it in a legal manner, it can, as an incident to the ownership, look after the same and be liable for the maintenance of a nuisance upon it. But that is not this case. Here the city was guilty of a wholly ultra vires act in attempting to purchase the land in question for a tourist camp, and under the holding of Markley v. Mineral City, supra, acquired no title to it."

Honorable Earl L. Schlef

It is our view that even though a city of the fourth class does not have statutory authority to purchase property within the corporate limits of another city, it does have authority to receive property as a gift or donation even though such property may lie within the corporate limits of another city. However, it is our view that such property would be within the jurisdiction of the municipality in which it is located in the same manner and to the same extent as other property privately owned would be.

Yours very truly,

JOHN C. DANFORTH
Attorney General